

United States Department of Agriculture
Research, Education and Economics

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Bulletin

Title: Preservation of All Tobacco Records

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Originating Office: Telecommunications and Records Branch,
Information Technology Division, AFM/ARS

Distribution: REE Offices in Headquarters, Areas, and Field Locations

The purpose of this Bulletin is to preserve any and all records in all media (including electronic records) related in any way to tobacco.

1. Background

Based on a court order in a pending civil action, United States of America v. Phillip Morris, Inc., the General Counsel requires that all USDA agencies immediately take steps to preserve any and all records in all media (including electronic records) relating in any way to tobacco. In addition, agencies must not authorize the destruction of any such records retired to a Federal Records Center.

2. Current Status

The Deputy General Counsel, Office of the General Counsel (OGC), issued an informational memorandum for custodians of departmental records (attached) which explains the current status of OGC's actions. You will be informed of any further developments.

3. Questions

Please direct questions to Stephen Pollard, Records Management Officer, by phone: 202-720-3359; fax: 202-720-6577; or Internet: spollard@ars.usda.gov.

-/Sd/-

KEITH W. ANDERSON
Director, Information Technology Division

INFORMATIONAL MEMORANDUM FOR CUSTODIANS OF DEPARTMENTAL RECORD

FROM: Terry Jackson
Deputy Assistant General Counsel
International Affairs and Commodity Programs Division
Office of the General Counsel

SUBJECT: Records Retention in United States of America v. Philip Morris, Inc.,
Civil Action No. 99-2496, U.S.D.C., D.C.

SUMMARY

Pursuant to a court order in the case captioned above, the Department of Justice has directed that all agencies within the U.S. Department of Agriculture must institute procedures to retain documents, records, and other physical evidence or potential evidence relevant to the subject matter of the litigation. The General Counsel has asked that I convey that message to all Departmental personnel that might be affected by that request. That request will, in addition, be the subject of a meeting with DOJ to be held on December 16, 1999, in the USDA's Administration building in Room 101-W (the General Counsel's Conference Room). We have already requested that certain individuals be present for that meeting -- others need not attend (and probably should not because of space constraints). I, or someone else attending the meeting, will issue a follow up memorandum as needed.

What follows in this memo which will emphasize is a short description of what needs to be done right away. Also, I have attached a list of what DOJ plans to discuss at the Dec. 16 meeting in terms of additional needs that will have to be met in the near future.

In the meantime, as set out below, however, no records relating at all to tobacco should be destroyed.

DISCUSSION:

As you may know, the United States has file suit against various manufacturers of tobacco products to recover money paid by the federal government for the care and treatment of smoking-related medical conditions and diseases, and for equitable relief under the Racketeer Influenced and Corrupt Organizations Act.

I have previously met with attorneys from other branches of OGC to discuss the need for preserving tobacco records and have done so after having been asked by the General Counsel to help coordinate the effort to provide assistance to DOJ in this matter. I was asked to take on that role because our division of OGC handles the legal work for the tobacco price support program (as well as handling international tobacco issues that are handled by the Foreign Agricultural Service). Other divisions

within OGC handle other activities that can have an impact on tobacco such as matters relating to commodity inspections, education, and statistics.

In the meantime, as a normal part of the litigation, the federal district court judge presiding over the case has issued, on October 19, 1999, a First Case Management Order for Initial Scheduling Conference which directed parties to the litigation to undertake various actions.

In paragraph 7 of the Order, the Court specifically directed that:

Each party shall preserve all documents and other records containing information potentially relevant to the subject matter of this litigation. Each party shall also preserve any physical evidence or potential evidence and shall not conduct any testing that alters the physical evidence without notifying opposing counsel and, unless counsel stipulate to the test, without obtaining the Court's permission to conduct the test.

Order at 4-5.

Accordingly, the Department of Justice has advised all federal agencies and all components of those agencies to preserve and not destroy or dispose of any documents or other records, including those recorded or stored electronically, that, in any way, relate to: (a) the treatment of smoking-related conditions or diseases; (b) research on such conditions or diseases; (c) grants or other payments made for research in connection with cigarettes or the tobacco industry; (d) payments of benefits for smoking-related conditions; (e) youth smoking; (f) nicotine and addiction; (g) cigarette design, including attempts to develop or market a potentially safer cigarette; (h) grants or other payments made for research in connection with cigarettes or the tobacco industry; (i) contacts between any officials, employees, agents, or servants of the USDA, on the one hand, and any officials, employees, agents, or servants of any member of the cigarette-manufacturing industry, the Council for Tobacco Research (or its predecessor, the Tobacco Industry Research Committee), or the Tobacco Institute; and (j) any other records that may relate to the use of tobacco products.

In order to assure that this mandate is met, we will consider that request, for the time being, to apply to any and all records dealing with tobacco. Furthermore, USDA components should preserve any physical evidence relevant to tobacco. This would include such things as displays for tobacco products, posters relating to the production of tobacco, wholesale packaging for tobacco products, or samples of tobacco products.

All USDA components must ensure that these documents and other records, including those recorded or stored electronically, are not unintentionally or accidentally destroyed as part of normal agency records retention and disposition procedures under the Federal Records Act.

If, in the course of normal business activities, records in these categories are identified, they should be catalogued and tracked so that they can be retrieved at a later date, if necessary.

Offices that have questions about whether particular records are subject to this memorandum, should consult the appropriate Regional General Counsel or this office. As for contacts to this office, you may contact that branch of OGC that normally handles legal questions for your agency or you may contact Michael Gurwitz of our division (International Affairs and Commodity Programs) who can be reached at 720-9262. If records subject to this order are inadvertently destroyed, the facility should notify the appropriate Regional Counsel and this office immediately.

As needed, supplemental memos may be issued relating to this topic but should consider this memo to be still in effect until you receive written notice to the contrary.

We understand that compliance with the demand of the litigation may prove burdensome, and regret any inconvenience that such compliance may cause.

It should be emphasized, however, that this is a large undertaking on the part of the federal government and will involve a large investment of time and resources -- and will, no doubt, involve claims of a very large amount. A failure to comply with the document retention and evidence preservation provisions that arise out of the court case could subject one or more government employees to monetary and other sanctions.

In addition, there may be from time to time future requests that are directed at the production of particular records or in which items of information are sought by the Department of Justice in connection with the prosecution of the case. All such requests should be handled as expeditiously as possible ---- taking care to assure that DOJ is aware and can pass upon, in consultation with the Office of General Counsel, issues of confidentiality that can arise in that connection.

In addition, we may be asked from time to time to produce new data or information that can be helpful to the DOJ. In that regard, please note that the attached Appendix is a list of such items already sought by DOJ. You will not need to do anything as yet with any of these items as more instructions will follow. However, this will give you some indication of what is to come and fairly quickly.

You can feel free to make this memo available to whomever within the Department may be affected by this memo and needs to know of these instructions. Otherwise, as this memo constitutes advice of counsel, it is privileged and should not be released without further advice from counsel.

CONCLUSION:

All tobacco records and property of any kind related to tobacco should be preserved until further notice. As needed, additional advice will follow. Further inquiries can be directed to Michael Gurwitz at 720-9262.

APPENDIX

Current DOJ Requests

So far DOJ has asked for the following information (This has been copied vebatim from a document sent over by DOJ):

1. Contact Persons:

Designated litigation counsel, address, phone, fax

Designated individual with knowledge or documents, address, phone, fax.

2. Agency background information. Provide a brief statement of the agency's mission, contacts with tobacco industry, and how the agency relationship with industry has changed over time.

3. Organization charts and list of agency personnel from 1945 to present.

4. Identify the various categories of agency documents related to the tobacco industry and tobacco products and provide a general description of each category's content. For each category identified, indicate the following:

a. The location(s) and custodians of the documents (including documents located in the main office, field offices, Federal Records Centers, and National Archives, or in the custody and control of outside consultants. Please include records of transfer for documents sent to Federal Records Centers, national Archives or outside consultants.);

b. the approximate quantity of documents at each location;

c. the format of the documents (such as hard copy, compute file, microfiche, etc.);

d. whether any indices exist to such documents and, if applicable, copies of such indices.

5. Indicate how your search was conducted, including the individuals responsible for conducting the search, the individuals contacted during the course of the search, and the physical locations and databases searched.

6. Describe the agency's retention policy related to how documents are maintained, for how long, and at which locations. Include any formal policy statements, regulations, or other applicable rules. If the agency has a designated record retention officer, please identify that individual.

7. Specify and include any regulations or statutes that may prevent the agency from producing certain documents or categories of information contained in relevant documents.

8. Indicate any privilege the agency intends to claim with respect to general categories of documents. Identify the agency employees who will review the documents and create privilege logs, as well as the agency official who will review the documents and file the necessary affidavit asserting the privilege.

9. If applicable, identify missing material, i.e. documents that have been removed or destroyed pursuant to agency policy.

10. Copy of retention notice sent to components pursuant to First Case Management Order issued by Judge Kessler on October 19, 1999.